

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. —

HOMER C. ZINK, Comptroller of the Treasury
of New Jersey, et al.,

*Petitioner and
Respondent-Appellee below,*

vs.

CITY OF JERSEY CITY, a municipal corporation
of New Jersey, et al.,

*Respondents and
Relators-Appellants below.*

Brief in Support of Petition for Writ of Certiorari.

OPINIONS OF COURTS BELOW.

The opinion in the Supreme Court (T. pg. 141) is reported in 132 N. J. L. 601.

The majority opinion in the Court of Errors and Appeals (T. pg. 151) is reported in 133 N. J. L. 437.

The two minority opinions in the Court of Errors and Appeals (T. pg. 164, and T. pg. 167) are reported in 133 N. J. L. 451 and 133 N. J. L. 453.

JURISDICTION.

(1) The date of the judgment to be reviewed is November 29, 1945. An order was entered holding the remittitur pending the filing of a petition for a re-argument. Said petition was filed on December 13, 1945, and denied January 3, 1946. The Court of Errors and Appeals is under Article VI, section I, of the New Jersey Constitution, the Court of "last resort in all causes."

(2) The jurisdiction of this Court is invoked under section 237 of the judicial code. The State of New Jersey through its alter ego, Homer C. Zink, Comptroller of the Treasury of New Jersey, contends that certain rights, privileges and immunities incidental to the enjoyment of its government established pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution have been abridged by the unconstitutional judgment entered by the New Jersey Court of Errors and Appeals in the instant case.

(3) The petitioner directed the attention of the said Court of Errors and Appeals by petition for re-argument as soon as practicable after he had knowledge of the unconstitutional acts of the Court. The petition for re-argument is attached to the transcript for the sole purpose of showing such notice.

(4) The Court of Errors and Appeals by its judgment committed two unconstitutional acts either of which should make its judgment a nullity; (1) It undertook consideration of a cause against the State without the State's consent; and (2) It proceeded to make an appropriation of State revenues contrary to Article IV, section VI, paragraph 2, of the New Jersey Constitution. Unless this Court undertakes to review this judgment, there is no method for obtaining a review of the improper judgment and it thus becomes apparent that there is a fundamental weakness in our constitutional system of checks and balances. Since

a review by this Court would eliminate that weakness, the State of New Jersey urges that, as an incident to the full enjoyment and orderly functioning of the government established under the guarantee provided in Article IV, section 4, of the United States Constitution this Court should undertake the review of the judgment in the instant case and, if the contentions of the State are proved, reverse such judgment.

(5) We have been unable to find any case similar to the one presently before this Court.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition above (pp. 1-5), which we pray leave to adopt and make a part of this brief.

SPECIFICATIONS OF ERROR.

(1) The New Jersey Court of Errors and Appeals erred in undertaking to consider a cause against the State of New Jersey without its consent.

(2) The New Jersey Court of Errors and Appeals erred in attempting by its judgment to make an appropriation of State revenues in violation of Article IV, section VI, paragraph 2, of the New Jersey Constitution.

(3) By the above unconstitutional acts, the said Court has interfered with the orderly functioning of the government established in New Jersey pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution and by so doing has abridged certain rights, privileges, and immunities which are given to the said State by the federal government as an incident to its full enjoyment of the government so established.

ARGUMENT.

Summary of Argument.

POINT A. An independent judicial review of any unconstitutional acts of the New Jersey Court of Errors and Appeals is necessary if we are to maintain the integrity of the republican form of government established pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution.

SUB-POINT 1. The New Jersey Court of Errors and Appeals has by its unconstitutional action violated the principles of and interfered with the orderly working of the government which was established by the people of New Jersey pursuant to the guarantee contained in the said Article IV, section 4, of the United States Constitution.

SUB-POINT 2. Unless the unconstitutional acts of the said Court of Errors and Appeals are subject to review by this Court, the State of New Jersey is without an adequate and effective remedy and will suffer great harm.

POINT B. The Federal Government owes a positive duty to the State of New Jersey, as a necessary incident of the guarantee contained in Article IV, section 4, of the United States constitution, to protect the said State against any abuses arising out of the operation of the government established under its guidance and pursuant to such guarantee and not otherwise adequately provided against by the system of checks and balances contained therein.

POINT C. This Court should issue its writ to review the question whether by its unconstitutional acts the New Jersey Court of Errors and Appeals made its judgment subject to review by this Court.

POINT A.

An independent judicial review of any unconstitutional acts of the New Jersey Court of Errors and Appeals is necessary if we are to maintain the integrity of the republican form of government established pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution.

In considering the present application, we urge this Court that it is the State of New Jersey appearing through its alter ego, Homer C. Zink, Comptroller of the Treasury of New Jersey, which comes before this Court to invoke any right, privilege or immunity which may be owed to the said State by the federal government as an incident to the guarantee by the said federal government as contained in Article IV, section 4, of the United States Constitution.

This petition and argument has confined itself as closely as possible to a consideration of the reasons why the writ should issue in the instant case and to our contentions concerning jurisdiction. As to the actual merits of our claim of constitutional violations in the entry of judgment we point out that (1) it has always been the law in New Jersey that the State of New Jersey may not be sued without its consent, and (2) the Legislature is the only one authorized to make an appropriation of State funds.

As for the first, *Strobel Steel Construction Co. vs. State Highway Commission*, 120 N. J. L. 298, 198 Atl. 774 (E. & A. 1938), is controlling. In that case the Court said:

“Moreover it may be said to be a fundamental rule of construction that what is not clearly granted by the state is withheld and that statutes permitting suits against the state being in derogation of sovereignty, must be strictly construed.”

This is no different than the law as expounded by this Court in the recent cases of *Great Northern Life Insurance Co. vs. Read*, 322 U. S. 47, and *Ford Motor Co. vs. Dept. of*

Treasury of Indiana, 65 S. Ct. 347. What constitutes a suit against the government is clearly defined in the opinion of this Court in *Mine Safety Appliance Co. vs. Forrestal*, No. 71 of the October term, decided on December 10, 1945. The opinion in the instant case shows that the court sought to determine a disputed question as to the existence of an appropriation. The action thereupon became one against the State.

Second—we again call attention to Article IV, section VI, paragraph 2, of the New Jersey Constitution which provides:

“No money shall be drawn from the treasury except for appropriation made by law.”

and Article IV, section IV, paragraph 6, and Article V, section VII, concerning the method of enacting a law.

We assert that in both of the above respects, either of which would be sufficient to make the judgment in this case a nullity, the New Jersey Court of Errors and Appeals has committed unconstitutional acts.

Sub-Point 1.

The New Jersey Court of Errors and Appeals has by its unconstitutional action violated the principles of and interfered with the orderly working of the government which was established by the people of New Jersey pursuant to the guarantee contained in the said Article IV, section 4, of the United States Constitution.

The State of New Jersey adopted its present Constitution in 1844. At this late date, we need no proof that it is republican in form and conforms to the government prescribed by Article IV, section 4, of the Federal Constitution.

Article III, section 1, provides:

“The powers of government shall be divided into three distinct departments—the Legislative, Executive, and

Judicial, and no person or persons belonging to or constituting one of these departments, shall exercise any of the powers belonging to either of the others, except as herein expressly provided."

The cases cited above show clearly that the granting of permission to sue the State is a legislative function. The law is clear that appropriations may be made only by the Legislature. When the Court of Errors and Appeals of New Jersey erred on both or either of these scores it violated the principles of the republican form of government as expressed in the said Article III and thereby interfered with the orderly working of a government which was established by the people of New Jersey pursuant to the guarantee contained in the United States Constitution.

Sub-Point 2.

Unless the unconstitutional acts of the said Court of Errors and Appeals are subject to review by this Court, the State of New Jersey is without an adequate and effective remedy and will suffer great harm.

As pointed out above, the New Jersey Courts have shown no hesitancy in declaring an act of the Legislature unconstitutional. That is a proper judicial function and curbs an abuse of power by the Legislature. Those Courts have shown no hesitancy in restraining unconstitutional acts of the executive branch—a further proper and healthy judicial function which tends to curb the abuse of power by the Executive. But nowhere in our constitutional scheme of checks and balances do we have a similar curb on the judiciary unless we can find it within the powers of this Court.

Cooley on "Constitutional Limitations" said on page 91 that the

"legislative department has an important restraint upon both the executive and the judiciary in the power of impeachment for illegal or oppressive action. * * *"

The New Jersey Constitution contains an impeachment provision. But impeachment is not an adequate or effective remedy because it goes not toward a correction of the offending judgment but to punishment of men. Also it might be well to observe, that when the unconstitutional conduct of the Executive is complained of, the Court does not suggest that the wronged person resort to impeachment. The Court restrains the wrongful act.

As has been pointed out, the State of New Jersey stands to lose upward of \$8,000,000 as a result of the present judgment. Since there is no other adequate and effective remedy contained within the government established pursuant to the federal guarantee, the State of New Jersey stands to suffer great harm unless a review is given by this Court under powers contained within the United States Constitution.

We submit that an independent judicial review of any unconstitutional acts of the New Jersey Court of Errors and Appeals is necessary if we are to enjoy an orderly and effective operation of the republican form of government established pursuant to the guarantee contained in Article IV, section 4, of the United States Constitution. We urge that such review may be had in this Court as a necessary incident of the guarantee contained in the said Article and to prevent a usurpation of power or interference with the orderly working of the government thereby guaranteed. We urge that the New Jersey Court of Errors and Appeals has violated those incidental rights, privileges or immunities in the instant case and so is reviewable by this Court.

POINT B.

The Federal Government owes a positive duty to the State of New Jersey, as a necessary incident of the guarantee contained in Article IV, section 4, of the United States Constitution, to protect the said State against any abuses arising out of the operation of the government established under its guidance and pursuant to such guarantee and not otherwise adequately provided against by the system of checks and balances contained therein.

The Federal Government by the clause in question has advocated the type of government presently in effect in the State of New Jersey. Before it can exercise its powers, Congress must know what government is established. *Luther vs. Borden*, 7 How. 42.

There have been many cases considered by this Court under this section of the Constitution. As far as we can learn there has not been a case similar to the one presently before this Court. Almost invariably the question has been whether some statute was inconsistent with the republican form of government—was in effect a denial of that form of government or whether one or the other of two governments was the lawful government. *Texas vs. White*, 7 Wallace 700; *Luther vs. Borden*, 7 Howard 1; *Minor vs. Happersett*, 21 Wallace 162; and *Pacific States T. & T. Co. vs. Oregon*, 223 U. S. 118, are representative of such cases. There is no doubt that the law of those cases is that questions arising under Article IV, section 4, are political and for Congress to determine. The principle is clearly stated in *Highland Farms Dairy Co. vs. Agnew*, 300 U. S. 608-612, wherein Mr. Justice Cardozo, said for this Court.

“How power shall be distributed by a state among its governmental organs is commonly, if not always a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution Art. 4, par. 4. Even if it were, the enforcement of that guarantee according to settled doctrine, is for Congress, not the Courts.”

It is interesting to note that in every instance there was an adequate remedy in the State courts to review the statute or action complained against. In not one of those cases was there shown the necessity of bringing the case within the jurisdiction of this Court in order to afford a remedy to a State which would otherwise have no forum within which to seek a redress of its wrongs occasioned by the unconstitutional acts of its highest Court.

We have not asserted and we do not now assert that the New Jersey Court of Errors and Appeals has attempted by its action to set up another form of government. But we do say that, since the people have established their republican form of government and since a usurpation by said Court has interfered with the working of that constitutionally established government, a federal question has arisen under Article IV, section 4, of the United States Constitution. Otherwise there is a fundamental weakness in our governmental set up that is not at all cured by the power of impeachment. It is inconceivable that the framers of our Constitution who knew abuse of power and who so jealously guarded against such abuse, could have intended such deficiency.

Alexander Hamilton said in discussing Article IV, section 4, in the Federalist No. XXI:

“A guaranty by the national authority would be as much leveled against the usurpation of rulers as against ferments and outrages of faction and sedition in the community.”

A study of the conditions existing during the critical period of the American Revolution must lead us to the conclusion that there was intended to be included within the system of constitutional checks and balances afforded by our dual system, an adequate remedy for the situation complained of in the instant case.

We again submit that a "guarantee of a republican form of government" loses much of its effectiveness if, when such government has been established, an abuse of power by the highest Court of a State may not be judicially reviewed, particularly in a case like the instant case where no other effective means of review is provided by our governmental set-up. In the interest of orderly judicial review—and so that there may be an independent effective review, at the instance of the people of a State, of a usurpation of power by the judiciary, it should be held that this case comes within the meaning of Article IV, section 4, and that under such section the State is possessed of certain rights and privileges incidental to the guarantee contained in the said Article. We respectfully submit that the Federal government owes that protection to the State as an incident of the said guarantee.

POINT C.

This Court should issue its writ to review the question whether by its unconstitutional acts the New Jersey Court of Errors and Appeals made its judgment subject to review by this Court.

We have tried to show that unless it is ultimately found that the judgment below is subject to review in this Court, the State of New Jersey is without a remedy against a threatened wrong. But regardless of whether this Court should ultimately so hold, we respectfully submit that we have sufficiently raised a federal question to warrant this Court in issuing its writ if in its wisdom it should find the question to be of sufficient importance to warrant the time of a very busy Court. We believe that, regardless of the many cases stating that the denial of a republican form of government is a political question and for Congress to determine, the State was, as an incident of the guarantee of a republican form of government, possessed of certain incidental rights and privileges under Article IV, section 4, that are applicable in the instant case and that for this

reason there has been presented a case in law or equity arising under the United States Constitution as required by Article III, section II, of that instrument.

We call attention to one further case arising under the said Article IV, section 4, *Marshall vs. Dye*, 231 U. S. 250, 34 S. Ct. 92. In that case the question was the constitutionality of a statute providing for a new constitution. The State Court held the act to be unconstitutional. Members of the election commission took an appeal to this Court. The Court said at page 94:

“ ‘We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision!’ ”

In that case the State Court acting within the limits of its constitutional authority passed upon the question. Its judgment was valid and binding. In our case the acts of the Court were unconstitutional and its judgment a nullity.

The Court said further on the same page:

“ ‘That the act of the state is charged to be in violation of the national Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in and affected adversely by the decision of the state court sustaining the act, and the interest must be of a personal, and not of an official, nature.’ ”

In the case cited by the Court, the party pressing the appeal had no interest in the subject matter. He sought to act for those whose taxes would be affected. We are not in that position. If we are right in our contention, the State of

New Jersey stands to lose many millions of dollars by the wrongful act of the Court of Errors and Appeals. The petitioner in this case is the State of New Jersey, acting through its alter ego, its duly elected Comptroller.

But again the *Marshall* case, and the *Braxton County* case cited therein, are not controlling for the reasons that they do not involve a situation where a State Court has violated the provisions of the Constitution which each member has sworn to uphold.

The remedy here suggested by the State of New Jersey would be good for our judicial system. It would be good for our governmental system of checks and balances. It is in keeping with that spirit of development and growth ever apparent in our federal judicial system. And it will fill a very urgent need.

We do not need to hesitate because it has taken so long to develop that rule. This Court in *United States vs. South-Eastern Underwriters Association*, 322 U. S. 833, 64 S. Ct. 1162, did not hesitate to rule adversely on a question which the members of the bar had deemed to be a fixed and certain precedent for very many years. And so with other developments under the commerce clause, the due process clause and other portions of our Federal Constitution made necessary by our changing economy and needs of the times. In a system of law that has proved its adaptability under such conditions, we must be able to find a satisfactory solution to the problem posed by the instant case. We respectfully submit that the writ should issue to determine whether or not there has lain dormant and unused all these years a power in this Court to review an unconstitutional usurpation of power by a State's highest court for the purpose of redressing a wrong done by such unlawful act. It is seemly that the highest Court of our land should undertake such review. If there be in fact a wrong this is the logical forum for redress. And in our approach to the present inquiry, we should assume the basic premise that usurpa-

tion of power by the judiciary may not be countenanced but should be resisted with the full force of our vigor.

In conclusion we respectfully urge that the Federal government owes a duty to the State of New Jersey to lend its aid in eliminating any fundamental weakness that exists and is basically inherent in the system of government that is prescribed and guaranteed by Article IV, section 4, of the United States Constitution. This Court can and we respectfully request this Court to undertake the performance of that duty. Any rule appropriate to the occasion would be circumscribed within very narrow limits. Unconstitutionality—usurpation must be conclusively proved. But once proved, we respectfully submit that this Court may act in order to prevent such usurpation.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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